# STATE OF MICHIGAN BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

**COMPLAINT AGAINST:** 

Hon. Kenneth D. Post 58<sup>th</sup> District Court 3100 Port Sheldon Road Hudsonville, Michigan 49426 Formal Complaint No. 90

#### **COMPLAINT**

The Michigan Judicial Tenure Commission ("JTC") files this complaint against Honorable Kenneth D. Post ("Respondent"), judge of the 58<sup>th</sup> District Court, County of Ottawa, State of Michigan. This action is taken pursuant to the authority of the Commission under Article 6, Section 30 of the Michigan Constitution of 1963, as amended, and MCR 9.200 *et seq*. The filing of this Complaint has been authorized and directed by resolution of the Commission.

- Respondent is, and at all material times was, a judge of the 58<sup>th</sup> District Court, County of Ottawa, State of Michigan.
- 2. As a judge, Respondent is subject to all the duties and responsibilities imposed on her by the Michigan Supreme Court, and is subject to the standards for discipline set forth in MCR 9.104 and MCR 9.205.

#### **COUNT I**

#### FAILURE TO FOLLOW TO THE LAW

- 1. Respondent, at all relevant times, was assigned to preside over *People v*Ethan Whale, 58<sup>th</sup> District Court Case No. HU-11-047997-SM (hereinafter "Whale").
- 2. The arraignment in *Whale* took place on December 2, 2011.
- 3. Attorney Scott Millard, P75153, appeared at the arraignment to represent Mr. Whale.
- 4. During the arraignment, Respondent asked Mr. Whale whether he would be "clean or dirty" if he were given a drug test on that day.
- 5. Mr. Millard advised Respondent that Mr. Whale was going to stand mute to that inquiry. (Transcript, page 6, lines 11-12)<sup>1</sup>
- 6. Respondent refused to accept Mr. Millard's answer, by stating:

He's not going to stand mute. He's either going to answer the question or I'm going to remand him to jail, because I'm setting bond. And I want to know the answer to the question. Now, the answer to the question is what, sir? (Transcript, page 6, lines 13-17)

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References are to the transcript for the December 2, 2011 arraignment, and will be referenced "Transcript."

- 7. After a recess, Respondent recalled the case and asked Mr. Whale if it was accurate that he did not wish to answer your questions as to the last time he used controlled substances. (Transcript, page 7, lines 6-9)
- 8. Mr. Millard replied in the affirmative. (Transcript, page 6, line 10)
- 9. Respondent then advised Mr. Millard that he was talking to the defendant and not to Mr. Millard, and attempted to question Mr. Whale directly over Mr. Millard's objection. (Transcript, page 6, lines 11-14)
- 10. Respondent recessed the proceedings again, and directed Mr. Whale to have a drug test. (Transcript, page 7, lines 16-18)
- 11. Respondent then recalled the case at 11:07 a.m., after the drug test was completed and reflected marijuana use, which was reported to the court.
- 12. Respondent again questioned Mr. Whale directly about when was the last time Mr. Whale used controlled substances. (Transcript, page 7, lines 23 to page 8, line 3)
- 13. Mr. Millard again intervened, and attempted to assert Mr. Whale's 5<sup>th</sup> Amendment right against self incrimination. (Transcript, page 8, lines 4-5)
- 14. Respondent cut off Mr. Millard when the attorney was attempting to assert that right on behalf of his client. (Transcript, page 8, line 6)

- 15. Respondent subsequently repeated his inquiry to Mr. Whale as to the last time he used a controlled substance, and asked for a specific date.

  (Transcript, page 8, line 25 to page 9, line 2)
- 16. Mr. Millard again attempt to assert Mr. Whale's 5<sup>th</sup> Amendment right. (Transcript, page 9, lines 3-4)
- 17. Respondent stated to Mr. Millard (regarding the attorney's allowing Mr. Whale to respond to your inquiry): "Now, if you don't want to do that, you can leave; your call." (Transcript, page 9, lines 8-9)
- 18. The following exchange took place at the arraignment, reflected at page 12, lines 6-21 of the transcript:

THE COURT: One more word, and I'm going to hold you in contempt. The first thing that I do when I hold somebody in contempt is I will give you a fine. The second thing I do, if you're in contempt again, is I'll remand you to jail, I don't want to do that, counsel ---

MR. MILLARD: Your Honor –

THE COURT: This is a legitimate question. And I'm going to ask it in determining what the bond level is going to be. And he is going to answer it or you're going to jail. And then I'll start dealing with him. The choice is completely yours. I don't want to go down this road. Don't force me to go down there, sir.

MR. MILLARD: Your Honor –

THE COURT: Be quiet is what I told you, didn't I?

MR. MILLARD: Your – Your Honor, can –

THE COURT: Don't go there.

19. The following exchange occurred during the arraignment, as reflected at page 12, line 25 to page 13, line 15 of the transcript:

THE COURT: ... Mr. Whale, what was the date that you last used, please?

MR. MILLARD: Your Honor –

THE COURT: Mr. Whale – I am not addressing you. Would you –

MR. MILLARD: This is – he has a –

THE COURT: Be quiet?

MR. MILLARD: Fifth Amendment right not to be forced to make an admission.

THE COURT: He is not making an admission against his interest at this point. He's making an admission that will grant him to be released so that he can go about his business and come in on another day when he will be clean. And –

MR. MILLARD: Your Honor –

THE COURT: -- if you don't like that, I'm sorry.

20. The following exchange then occurred, as reflected at page 13, line 16 to page 14, line 3 of the arraignment transcript:

MR. MILLARD: Your – Your Honor, he was not on bond.

THE COURT: I don't give a rat's tail if he -

MR. MILLARD: He didn't have a condition of bond –

THE COURT: -- was or he wasn't.

MR. MILLARD: -- that prohibited that.

THE COURT: Counsel, will you be quiet?

MR. MILLARD: I cannot be quiet to this Court's insist—

THE COURT: One hundred dollars in contempt of Court, the first sanction. Now, if you want to keep going, you name it, because we're going to do it by the days. I don't particularly want to go there. But you're more than welcome to help me. Mr. Whale –

21. The following exchange then occurred during the arraignment, as reflected at page 14, lines 4 to 17 of the transcript:

MR. MILLARD: Your Honor, you're insisting that he make an admission. He has a Fifth Amendment right not to make an admission.

THE COURT: This is your second warning. I don't give a third. You make the call. And if you go, you're going to be there for the whole weekend. You make the call. Mr. Whale, when was the last time you used a controlled substance?

MR. MILLARD: Your Honor –

THE COURT: Counsel, I'm holding you in contempt of Court. Remand him to jail. Mr. Whale, we'll be back here on Monday morning. Mr. Whale, we'll be back here on Monday morning, and we'll do this again, with your attorney here to represent you. I want you here at 8:00 Monday morning. We're adjourned.

- 22. After Respondent adjourned the arraignment, Mr. Millard was taken into custody by the Ottawa County Sheriff's Office.
- 23. While Mr. Millard was in custody and en route to jail, Respondent summoned the attorney to return to Respondent's court.
- 24. When Mr. Millard appeared, he was handcuffed behind his back during the entire proceeding.
- 25. Respondent stated that he was willing to release Mr. Millard if the attorney would agree to appear in court the following Monday and allow Mr. Whale to reply to Respondent's questions. Respondent further stated that if Mr. Millard would not make that representation, he could "go to jail at [that] point." (Transcript, page 14, line 22 to page 15, line 2)
- 26. After further discussion, Respondent again remanded Mr. Millard to jail. (Transcript, page 17, lines 13-14)
- 27. After Mr. Millard was transported to the jail and spent some time in custody, an emergency hearing was scheduled in the 20<sup>th</sup> Circuit Court to review Respondent's decision to hold the attorney in contempt.
- 28. While Mr. Millard waited to be transported to the circuit court in Grand Haven, he was locked in a jail cell for approximately one hour.

- 29. When Mr. Millard was transported from the jail to the circuit court, his arms were cuffed, his legs were shackled, and both were attached to a "belly chain" around his waist.
- 30. At the review hearing held in 20<sup>th</sup> Circuit Court, Mr. Millard was released from custody, several hours after he was ordered into custody by Respondent.

#### **COUNT II**

### **IMPROPER DEMEANOR TO COUNSEL**

- 31. Respondent refused to accept Mr. Millard's attempt to assert the 5<sup>th</sup> Amendment privilege on behalf of Mr. Whale when Respondent asked if the result of a drug test would be "clean or dirty," and attempted to compel the defendant to answer. (Transcript, page 6, line 13 to page 7, line 1)
- 32. Included in Respondent's remarks to Mr. Millard were directives to "Be quiet" and to "Sit down."
- 33. Mr. Millard responded by stating: "I'm counsel, Your Honor." (Transcript, page 7, line 2)
- 34. In response, Respondent replied: "I'm encouraged." (Transcript, page 7, line 3)

- 35. Respondent's remarks were sarcastic and demeaning toward Mr. Millard.
- 36. Later during the arraignment, after a recess, Respondent recalled the case and asked Mr. Whale if it was accurate that he did not wish to answer Respondent's questions as to the last time the defendant used controlled substances. (Transcript, page 7, lines 6-9)
- 37. Mr. Millard replied in the affirmative. (Transcript, page 7, line 10)
- 38. Respondent then advised Mr. Millard that he talking to the defendant, and not to Mr. Millard. (Transcript, page 7, line 11)
- 39. Mr. Millard repeated that he was Mr. Whale's attorney. (Transcript, page 7, line 12)
- 40. Respondent again asserted: "I'm encouraged." (Transcript, page 7, line 13)
- 41. Respondent's remark was sarcastic and demeaning toward Mr. Millard.
- 42. Later in the arraignment, Mr. Millard asserted that Mr. Whale had a 6<sup>th</sup> Amendment right to effective assistance of counsel. (Transcript, page 9, line 10-11)
- 43. Respondent replied by stating: "That's right. And that's not what he's getting at the moment." (Transcript, page 9, line 12-13)

- 44. Respondent's remark was demeaning toward Mr. Millard.
- 45. Mr. Millard replied to your comment: "Your Honor, I -- I strongly disagree with that." (Transcript, page 9, line 14-15)
- 46. Respondent made the following comment in response: "I'm glad."

  (Transcript, page 9, line 16)
- 47. Respondent's statement was sarcastic and demeaning toward Mr. Millard.
- 48. Following further discourse regarding the bond, the following exchange occurred:

MR. MILLARD: Your Honor, I think – I think it would be entirely reasonable to set Mr. --

THE COURT: I'm not interested in what you think. Haven't you gotten that yet?

MR. MILLARD: I have gotten that.

THE COURT: I really am not.

MR. MILLARD: And I understand that. And, Your Honor, the Court fully certainly has the right to not care what I say.

THE COURT: Thank you. Then be quiet.

(Transcript, page 11, lines 16 to 25)

49. Respondent's statements were demeaning to Mr. Millard.

- 50. During the course of the arraignment, Respondent repeatedly interrupted Mr. Millard, and directed the attorney to "be quiet" or "sit down" when counsel was attempting to advocate on behalf of Mr. Whale.
- 51. During the review of Respondent's decision to hold Mr. Millard in contempt when counsel was brought back to the courtroom at Respondent's direction, Respondent continued to interrupt Mr. Millard when he attempted to explain the basis for his assertion of the 5<sup>th</sup> Amendment privilege on behalf of Mr. Whale.
- 52. Respondent's repeated directives to Mr. Whale to "be quiet" or "sit down," and interruptions while the attorney was attempting to advocate on behalf of Mr. Whale, were disrespectful and demeaning to Mr. Millard.

## **COUNT III**

## TRIVIALIZATION OF COURT PROCEEDINGS

- 53. After Respondent remanded Mr. Millard to jail, Respondent recalled the attorney to the courtroom to review the contempt issue.
- 54. Immediately before the review of the decision to hold Mr. Millard in contempt, at 11:55:30 A.M. (referenced as Position 1:44:30 on the electronic record for Respondent's morning court session on December 2, 2011), Respondent made the following remarks, while laughing:

THE COURT: Good thinking. The show is just beginning. You won't get better tickets anyplace. I'd sit up close if I were you.

UNIDENTIFIED SPEAKER: Okay.

THE COURT: The front row is good.

- 55. Respondent's comments and laughter trivialized a court proceeding, where he infringed on the constitutional rights of a defendant and improperly held an attorney in contempt and sent him to jail for advocating on behalf of his client.
- 56. Respondent's comments displayed a lack of respect for the court process and justice system.
- 57. Respondent's comments and laughter was disrespectful and demeaning toward Mr. Millard.

The conduct described in paragraph nos. 1-57 constitutes:

- (a) Conduct which violates the 5<sup>th</sup> Amendment to the United States

  Constitution, and Article I, Section 17 of the Michigan

  Constitution.
- (b) Conduct which violates the 6<sup>th</sup> Amendment to the United States

  Constitution, and Article I, Section 20 of the Michigan

  Constitution.

- (c) Conduct which violates MCL 600.1701, addressing contempt.
- (d) Misconduct in office, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.205.
- (e) Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30 and MCR 9.205.
- (f) Conduct which is prejudicial to the proper administration of justice, in violation of MCR 9.104(1).
- (g) Failure to establish, maintain, enforce, and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to the Code of Judicial Conduct, Canon 1.
- (h) Failure to be aware that the judicial system is for the benefit of the litigant and the public, and not the judiciary.
- (i) Irresponsible or improper conduct which erodes public confidence in the judiciary, in violation of the Code of Judicial Conduct, Canon 2A.
- (j) Conduct involving impropriety and the appearance of impropriety, in violation of the Code of Judicial Conduct, Canon 2A.

- (k) Failure to respect and observe the law and to act at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary, contrary to the Code of Judicial Conduct, Canon 2B.
- (1) Failure to be faithful to the law, contrary to the Code of Judicial Conduct, Canon 3A (1).
- (m) Failure to be patient, dignified, and courteous to lawyers with whom the judge deals in an official capacity, contrary to the Code of Judicial Conduct, Canon 3A (3).
- (n) Unnecessary interruptions of counsel during arguments, contrary to the Code of Judicial Conduct, Canon 3A (8).
- (o) Conduct, which exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2).
- (p) Conduct, which is contrary to justice, ethics, honesty or good morals, in violation of MCR 9.104(3).
- (q) Conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court, contrary to MCR 9.104(4).

- (r) Conduct that violates the 5<sup>th</sup> Amendment to the United States

  Constitution, and Article I, Section 17 of the Michigan

  Constitution, addressing a defendant's privilege against selfincrimination.
- (s) Conduct that violates the 6<sup>th</sup> Amendment to the United States

  Constitution, and Article I, Section 20 of the Michigan

  Constitution, addressing a defendant's right to counsel in a criminal proceeding.
- (t) Conduct that violates MCL 600.1701, addressing contempt.

Pursuant to MCR 9.209, Respondent is advised that an original verified answer to the foregoing complaint, and nine copies thereof, must be filed with the Commission within 14 days after service upon Respondent of the complaint. Such answer shall be in a form similar to the answer in a civil action in a circuit court and shall contain a full and fair disclosure of all the facts and circumstances pertaining to Respondent's alleged misconduct. The willful concealment, misrepresentation, or failure to file such answer and disclosure shall be additional grounds for disciplinary action under the complaint.

JUDICIAL TENURE COMMISSION OF THE STATE OF MICHIGAN

3034 W. Grand Boulevard, Suite 8-450 Detroit, Michigan 48202

By:	/s/
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	Examiner
	/s/
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July 23, 2012

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